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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-6413

BERTHE LETOURNEAU,

Appellant,

- against -

JOSEPH A. CALIFANO, as Secretary of Health, Education and Welfare of the United States, and JEROME KURTZ, as United States Commissioner of Internal Revenue,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

BERTHE LETOURNEAU appeals from the final judgment of a three-judge Court in the United States District Court for the Southern District of New York, entered on January 12, 1979, dismissing the amended complaint in this action and upholding, under the Due Process Clause of the Constitution of the United States, the validity of Section 211(c)(2)(C) of the Social Security Act (hereinafter "Act"), 42 U.S.C. § 411(c)(2)(C) and Section 1402(c)(2)(C) of the Internal Revenue Code of 1954, 26 U.S.C. § 1402(c)(2)(C). Those statutory provisions deny appellant, an alien lawfully admitted for permanent residence in the United States (lawful permanent resident), (a) eligibility for Social Security retirement and hospital insurance benefits and (b) liability for the Social Security self-employment tax, solely because of her status as a non-citizen with a particular kind of employment background. Appellant submits this statment to show that the Court has jurisdiction of this appeal and that the questions presented are so substantial as to require plenary consideration.

OPINIONS BELOW

The opinion of the three-judge Court (Hayes, C.J., Broderick, D.J. and Duffy, D.J.) in the Southern District of New York is reported at 453 F. Supp 636 and is annexed hereto as Appendix A. Annexed hereto as Appendix B is the opinion of the single District Judge (Duffy, D.J.) denving plaintiff's motion for class certification and the convening of a three-judge court. This opinion is reported at 431 F. Supp. 1013. The opinion of the United States Court of Appeals for the Second Circuit remanding the case to the District Court for consideration of the substantiality of plaintiff's constitutional claims, reported at 559 F. 2d 892, is annexed hereto as Appendix C.

JURISDICTION

This action was commenced by the plaintiff pro se in the United States District Court for the Southern District of New York. Subsequently, an amended class action complaint was filed pursuant to 42 U.S.C. § 405(g) and 28 U.S.C. §§ 1361, inter alia, seeking a judgment declaring unconstitutional and enjoining the enforcement of 42 U.S.C. § 411(c)(2)(C) and 26 U.S.C. § 1402(c)(2)(C) insofar as these provisions deny lawful permanent residents of the United States quarters of coverage for purposes of the Social Security retirement and hospital insurance programs for work performed in the United States while employed by a foreign government or an instrumentality wholly owned by a foreign government. In an opinion filed on December 14, 1976, District Judge Duffy denied plaintiff's motion for class certification and, concluding that injunctive relief was not available under Section 205(g) of the Social Security Act,[1] denied plaintiff's motion to convene a three-judge court. On review of this latter determination, the Court of Appeals for the Second Circuit held that 42 U.S.C. § 405(g) does not bar the issuance of an injunction against the operation of a Federal statute and remanded the case for consideration of the substantiality of plaintiff's constitutional claims.

In an endorsement filed on February 2, 1978, District Judge Duffy found the constitutional questions presented by this action to be sufficiently substantial to require the convening of a three-judge court pursuant to 23 U.S.C. §§ 2282 and 2284. On July 24, 1978, after hearing argument, the three-judge court

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1. The District Court also rejected all other bases for injunctive relief.

filed its opinion finding plaintiff's constitutional claims to be without merit and denying plaintiff's motion for summary judgment while granting defendants' motion for summary judgment. The District Court's judgment, ordering that the amended complaint be dismissed with prejudice, was originally entered on October 2, 1978. That judgment was vacated and reentered by order of the three-judge court, dated January 12, 1979 and annexed hereto as Appendix D, The amended judgment is annexed hereto as Appendix E. On January 25, 1979 appellant filed a notice of appeal to this Court, attached hereto (with the affirmation of service) as Appendix F. The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U.S.C. § 1253.

STATUTES INVOLVED

This case involves the constitutional validity of Section 211(c)(2)(C) of the Social Security Act, 42 U.S.C. § 411(c)(2)(C), 64 Stat. 492 (1950), as amended by 68 Stat. 1054, 1078 (1954), as amended by 70 Stat. 824-826, 828 (1956), as amended by 74 Stat. 937, 938, 945, and of Section 1402(c)(2)(C) of the Internal Revenue Code of 1954, 26 U.S.C. § 1402(c)(2)(C), 68A Stat. 353 (1954), as amended by 68 Stat. 1087 (1954), as amended by 74 Stat. 926, 927, 938, 944, 945 (1960). The verbatim text of these statutes is set forth in Appendix G. Also implicated herein are Sections 210(a)(11) and (12) of the Social Security Act, 42 U.S.C. §§ 410 (a)(11),(12), 60 Stat. 979 (1946), as amended by 68 Stat 1052, 1061 (1954), and as incorporated into 42 U.S.C. § 411(c)(2)(C), and Sections 3121(b)(11) and (12) of the Internal Revenue Code of 1954, 68 Stat. 417 (1954), as amended by 70 Stat. 878 (1956) and as incorporated into

26 U.S.C. § 1402(c)(2)(C). The verbatim text of these statutes is set forth in Appendix H.[2]

QUESTIONS PRESENTED

Whether 42 U.S.C. § 411(c)(2)(C) and 26 U.S.C. § 1402 (c)(2)(C) unconstitutionally discriminate against appellant on the basis of alienage in violation of the equal protection principles of the Due Process Clause of the Fifth Amendment to the United States Constitution by denying an alien lawfully admitted for permanent residence in the United States quarters of coverage for purposes of the Social Security retirement and hospital insurance programs for work she performed in the United States while employed by a foreign government or an instrumentality wholly owned by a foreign government while United States citizens earn quarters of coverage for identical employment as do aliens in all other areas of covered employment under the Social Security program.

STATEMENT

I. STATUTORY SCHEME

A. Retirement Insurance Benefits

Section 202(a) of the Social Security Act, 42 U.S.C. § 402(a), provides for the payment of monthly retirement (old-age)

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2. In the interest of brevity, the text of the discussion below will refer primarily to the Social Security Act provisions implicated herein, as the Internal Revenue Code provisions are identical and merely serve to conform the taxation aspect of the program to the benefit aspect. If appellant ultimately prevails on her claims she will be entitled to invalidation of both the Social Security Act and corresponding Tax Code provisions.

insurance benefits to a fully insured individual who has attained age 62 and filed an application for such benefits. As applied to the appellant herein, the term fully insured individual means an individual who has accumulated at least one quarter of coverage, whenever acquired, for each calendar year after 1950 and before the year in which the individual attains age 62. 42 U.S.C. § 414(a). A quarter of coverage is a period of three calendar months ending on March 31, June 30, September 30 or December 31 during which an individual was paid $50 or more in wages or for which he or she has been credited with $100 or more of "self-employment income." 42 U.S.C. § 413(a).

Pursuant to Section 211(b) of the Social Security Act, 42 U.S.C. § 411(b), self-employment income equals the net earnings from self-employment derived by an individual, other than a non-resident alien, during any taxable year beginning after 1950, with certain exceptions not here relevant. Net earnings from self-employment is further defined by Section 211(a) of the Act, 42 U.S.C. § 411(a), to mean the "gross income ... derived by an individual from any trade or business carried on by such individual" adjusted by certain deductions, additions and exclusions not applicable to appellant. Section 211(c)(2)(C) of the Act, 42 U.S.C. § 411(c)(2)(C), excludes from the definition of trade or business (when used with reference to self-employment) the performance of service by an individual as an employee, except, inter alia, service performed in the United States by a citizen of the United States (1) in the employ of a foreign government; or (2) in the employ of an instrumentality wholly owned by a foreign government.

Subdivision (C) of Section 211(c)(2) was added to the Act in 1960. Social Security Amendments of 1960, Pub. L. No. 86-778, § 106(a), 74 Stat. 924. Prior to this amendment, the

above two types of service were not included in the definition of trade or business, regardless of the nationality or residence of the individual performing such service, nor was such service otherwise covered for retirement insurance purposes by the Social Security Act. See 42 U.S.C. §§ 410(a)(11) and (12); Pub. L. No. 379, 76 Cong., 1st Sess. § 902(f)(August 5, 1939).

Thus, the retirement insurance program of the Social Security Act provides coverage for citizens performing the services enumerated in 42 U.S.C. §§ 410(a)(11) and (12) but does not extend such coverage to aliens lawfully admitted for permanent resident who perform identical services.[3] Furthermore, the Act provides coverage for aliens engaging in all forms of covered employment and self-employment within the United States except where the alien is employed by a foreign government, its instrumentality or an international organization.

B. Hospital Insurance Benefits

Pursuant to Section 226(a) of the Social Security Act, 42 U.S.C. § 426(a), any individual who has attained age65 and is entitled to retirement insurance benefits pursuant to Section 402 of the Act is entitled to hospital insurance benefits as provided by 42 U.S.C. §§ 1395 c-i (Part A of the Medicare program). If an individual is not entitled to retirement insurance benefits he or she will still be entitled to hospital insurance benefits if he or she has acquired at least three quarters of coverage for each calendar year elapsing after 1966 and before the year in

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3. For reasons to be discussed below, see notes 9-11 and accompanying text, infra, service for such employers is not covered by the wage-earner provisions of the Social Security Act.

which he or she attained age 65. As is the case with retirement insurance benefits, "quarters of coverage" excludes coverage of service for a foreign government or an instrumentality wholly owned by a foreign government unless performed within the United States by a citizen of the United States.[4] As above, aliens engaged in all areas of covered employment and self-employment except those delineated in 42 U.S.C. § 410(a)(11),(12) and (15) also earn quarters of coverage.

II. FACTS OF APPELLANT'S CASE

The facts of appellant's case dramatically illustrate the invidious discrimination and harsh inequities of the above statutory scheme. Appellant Berthe Letourneau is a seventy-five year old alien who has continuously resided in the United States since her entry in 1944. Effective October 24, 1967, appellant was granted the status of an alien lawfully admitted for permanent residence in the United States, pursuant to Section 249 of the Immigration and Naturalization Act, 8 U.S.C. § 1259.

From March 1968 until April 1972, inclusive, appellant was employed by the Press and Information Division of the French Embassy at 972 Fifth Avenue in New York City. During this time, she reported her salary to the Internal Revenue Service (IRS) and paid all of the Social Security self-employment and Federal income taxes due thereon. The IRS accepted and retained those payments.

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4. 26 U.S.C. §§ 1401 and 1402 complement the benefit provisions of the Social Security Act with corresponding taxation provisions. Under these sections self-employment income, defined identically in all relevant respects to self-employment income under the Social Security Act, is subject to a self-employment tax. Thus, all those individuals engaging in activities that fall within the self-employment coverage of the Social Security Act are subject to the self-employment tax of 26 U.S.C. § 1401, while individuals not covered by the self-employment provisions of the Social Security Act are not.

During the period of her employment at the French Embassy plaintiff earned adequate income for a sufficient number of quarters to entitle her both to retirement benefits under Title II of the Social Security Act and hospital insurance benefits under Title XVIII of the Act.

On January 24, 1972 plaintiff filed an application with the Social Security Administration for retirement, hospital and medical insurance benefits. After exhausting the available administrative remedies, appellant was granted medical insurance benefits pursuant to 42 U.S.C. § 1395o,[5] but insofar as she is not a citizen of the United States, appellant was found ineligible for retirement and hospital insurance benefits because the income derived from services she had performed for the French Embassy was not covered self-employment income under Section 211(c)(2)(C) of the Social Security Act, 42 U.S.C. § 411(c)(2)(C). Without the income derived from services she had performed for the French Embassy she did not have sufficient quarters of coverage to qualify for the retirement and hospital insurance programs.[6] Had this income been considered as part of appellant's work history for purposes of determining her entitlement to retirement and hospital insurance benefits, she would have been elligible for

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5. Every individual who -
(1) is entitled to hospital insurance benefits under part A, or

(2) has attained age 65 and is a resident of the United States, and is either (A) a citizen or (B) an alien lawfully admitted for permanent residence who has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment under this part,

is eligible to enroll in the insurance program established by this part.

6. Appellant's income would, but for the operation of 42 U.S.C. § 411 (c)(2)(C) and 26 U.S.C. § 1402(c)(2)(C), result in her being credited with 20 quarters of coverage, four quarters per year for each of the years 1969-72, inclusive.

these programs.[7] The sole basis for appellant's exclusion from these programs is that she is a non-citizen of the United States who was employed by a foreign government. Thus, the issue raised by this action is whether the unique classification created by 42 U.S.C. § 411(c)(2)(C) and 26 U.S.C. § 1402 (c)(2)(C) is violative of rights guaranteed by the equal protection principles of the Due Process Clause of the Fifth Amendment to the United States Constitution.

7. See 42 U.S.C. §§ 402(a), 414(a) and 426(a).

THE QUESTION IS SUBSTANTIAL

This case presents substantial federal questions which call into question the constitutionality of a federal statute of nationwide impact and which require plenary consideration by this Court. At stake for appellant, an alien lawfully admitted for permanent residence in the United States, is her interest in not being invidiously excluded from the Social Security retirement and hospital insurance programs while all similarly situated citizens and aliens in all other employments are covered by these programs. The discrimination faced by appellant is doubly invidious. In addition to suffering a deprivation not suffered by American citizens in the same occupation, appellant is divested of the Social Security coverage enjoyed by all other aliens engaged in covered areas of employment and self employment within the United States. Hence, the challenged classification discriminates not merely between aliens and citizens, but as well between different groups of similarly situated aliens. This criss-cross pattern of discrimination is at once wholly irrational and devoid of any legitimate government interest.

When considering the validity of a legislative classification that discriminates against an insular group, the mere recitation of a benign purpose does not shield the enactment from an inquiry by this Court into the actual purposes underlying that statutory scheme. Where Congress has revealed the purposes behind the challenged discrimination this Court must, at the very least, measure the rationality of the classification against those purposes. Weinberger v. Wisenfeld, 420 U.S.636, 648-49, 43 L.Ed 2d 514, 525 (1975); Jiminez v. Weinberger, 417 U.S. 628, 633-35, 41 L.Ed. 2d 363, 368-69 (1974). And where,

as here, a statutory distinction makes no sense in light of the statutory and regulatory scheme, it cannot withstand Equal Protection analysis. Weinberger v. Wisenfeld, supra; Jiminez v. Weinberger, supra. An analysis of the legislative scheme herein reveals that the exclusion of appellant from the Social Security retirement and hospital insurance programs is not related in any way to the articulated Congressional purposes supporting this legislation.

Because the actual purpose underlying the challenged legislation is disclosed by the legislative history, appellant submits that this is not a case where the District Court could presume that any conceivable interest which might rationally be served by the statute did in fact give rise to its adoption.[8] Compare Weinberger v. Wisenfeld, supra, and especially the concurring opinion of Rehnquist, J., with Hampton v. Mow Sun Wong, 426 U.S. 88, 103, 48 L.Ed. 2d 495 (1975). Moreover, the imagined purposes attributed to Congress by the District Court in this case are so speculative and their relationship to the statutory scheme so attenuated that they cannot properly be invoked in support of the discrimination, even if the "any conceivable interest" test were applicable here. The District Court's analysis should be condemned by this Court as totally at odds with and rendering toothless the equal protection principles of the Fifth Amendment's Due Process Clause.

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8 It is important to note that this case does not implicate Congress' power to regulate the admission and retention of aliens, a power that has been variously described as "largely immune from judicial control," Fiallo v. Bell, 430 U.S. 737, 52 L.Ed.2d 50, 56, quoting Shaughnessy v. Mezei, 345 U.S. 206, 210, 97 L.Ed. 956, 961 (1953); "plenary," Hampton v. Mow Sun Wong, 426 U.S. 88, 99, 48 L.Ed.2d 495, 506 (1976); and "virtually unrestricted," Francis v. Immigration and Naturalization Service, 532 F.2d 268, 272 (2d Cir. 1976). Rather, this case involves choices made by Congress in governing the treatment of aliens once they have been lawfully admitted, and as such requires this Court to measure the statutory discrimination challenged herein against the strictures of the Due Process Clause.

The legislative history of the Social Security Act and pertinent amendments reveals the actual interests to be served by the challenged amendments. The old age or retirement program of the Social Security system was created by statute in 1935. Its primary objective was to provide workers and their families with basic protection against hardships created by the loss of earnings due to illness or old age. Mathews v. De Castro, 429 U.S. 181, 185-86, 50 L.Ed.2d 389, 394 (1976). In its original form only employees were covered by the Act, which was financed by a tax levied on both the employer and employee.

The Act, as initially promulgated, contained no specific characterizations or distinctions among individuals in the employ of foreign governments or their instrumentalities, nor were distinctions drawn between citizens and aliens for the purposes of coverage.[9] Thus, it was clearly contemplated by Congress that both citizen and non-citizen employees of foreign governments and their wholly-owned instrumentalities would

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9 In fact, from the outset, the bill was meant to benefit both citizens and aliens alike.

> I understand that someone has objected to the wording in our bill because we have said that those engaged in maritime employment on American vessels shall be covered irrespective of citizenship. Mr. Chairman, this language refers to any employee, and to any employer as well. The man who works in the Ford factory in Michigan, the man who works in the cannery in California, is building up his old-age record regardless of the fact that he is an American citizen, and regardless of whether he is employed by one.

84 Cong. Rec. 6862 (1939).

> Every employee in covered employment in the United States, whether he is a citizen or alien ... is covered.

84 Cong. Rec. 6937 (1939).

earn quarters of coverage for Social Security purposes, as was and remains the case for all other covered employments within the United States. Moreover, aliens in all areas of covered employment were eligible for benefits. An unanticipated problem soon surfaced, however, leading to a 1939 amendment. The foreign consuls responsible under the Act for the employer's contribution on behalf of both citizen and non-citizen employees refused to pay, and the drafters of the legislation realized that, due to the doctrine of international sovereign immunity, the tax was uncollectable. Proposed Amendments to the Social Security Act: Hearings on the Social Security Act Amendments of 1939 (H.R.6635), before the Committee on Ways and Means of the House of Representatives, 76th Cong. 1st Sess. 2141-42, 2145 (1939) (Statement of Nathaniel G. Davis, Chief of Foreign Services, Department of State); H.R. Rep. No. 728, 76th Cong. 1st Sess. 18, 48-49, 74 (1939). Based upon this purely practical consideration, coverage for employees, both citizen and alien, of foreign governments and their instrumentalities was withdrawn from the Social Security Act. This was accomplished by specifically excepting such service from the definition of employment as contained in the Act. Pub.L.No. 379, 76th Cong. 1st Sess. § 902(f) (1939), presently codified at 42 U.S.C. §§ 410 (a) (11), (12).[10] Thus, elimination of both citizen and non-citizen employees of foreign governments and their instrumentalities from the ambit of the Social Security Act represented congressional recognition of the state of international affairs -- the

[10] Corresponding amendments of the Internal Revenue Code were made exempting foreign governments and their instrumentalities from liability for the employer's tax. These amendments are presently at 26 U.S.C. §§ 3121 (b) (11), (12).

employer contribution for these employees could not be collected-- and in no way implicated any purpose relating to immigration and naturalization. It is clear from this development that throughout the early evolution of the Social Security retirement and hospital insurance programs Congress intended to treat alike both citizen and non-citizen employees of foreign governments and their instrumentalities. No distinction was made between these two groups because they were identically situated vis-a-vis the exclusive Congressional concern for collection of the tax.

By amendment in 1950 the Social Security Act was expanded to provide coverage for self-employed individuals. 42 U.S.C. §§ 411-413 (originally enacted as Act of August 28, 1950, C.809, Title I, § 104(a), 64 Stat. 492). Pursuant to the self-employment provisions of the Act, citizens and aliens engaging in a covered trade or business earn quarters of coverage for Social Security retirement and hospital insurance purposes and are liable for a self-employment tax to finance benefits under the program. Insofar as there is only one taxpayer to support the self-employment program (there is no employer to share the burden) "self-employed" individuals pay a greater tax than "employees" under the Act. Compare 26 U.S.C. § 1401 with 26 U.S.C. § 3101.

Congress eventually realized that it could avoid the problem involved in taxation of foreign governments and their instrumentalities, and thus extend coverage under Titles II and XVIII of the Social Security Act to their employees, if these employees were treated as self-employed individuals. See, e.g., S. Rep. No. 1856, 86th Cong., 2d Sess. 25, reprinted in [1960] U.S. Code Cong. and Ad. News 3609, 3632. However, despite its prior evenhanded treatment of both

citizens and non-citizens and the fact that the rationale for removing the bar to coverage imposed in 1939 applied equally to both groups, Congress inexplicably amended the Act to extend self-employment coverage only to citizens working in the United States for foreign governments and their instrumentalities.[11]

Throughout the history of these provisions there is a single legislative purpose, to ensure collection of the tax on behalf of employees of foreign governments and their instrumentalities. Initially, coverage was extended to all such employees. When the tax proved to be uncollectible coverage was withdrawn from all such employees. When the tax became collectible, through the self-employment fiction, coverage was re-extended only to citizens.

Conspicuously absent from the legislative history of this amendment is any mention of the reason for Congress' failure to restore social security coverage to aliens, as well as citizens, employed within the United States by foreign governments and their instrumentalities. Given the articulated legislative purpose of the amendments, this failure to restore coverage to non-citizens in the service of foreign governments and their instrumentalities is mindless and utterly irrational. This mindlessness is underscored by the fact that in other areas of Social Security coverage where, because of pragmatic considerations such as the difficulty or impossibility of collecting the employer's tax, employees are treated as self-employed individuals coverage

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11. This was accomplished by expanding the definition of trade or business when used with reference to self-employment to include service excepted from the definition of employment by 42 U.S.C. §§ 410(a)(11) and (12) when performed in the United States by a citizen of the United States. Social Security Amendments of 1960, Pub.L. No. 86-778, § 1906, 74 Stat. 924 (amending 42 U.S.C. § 411 (c)(2) and 26 U.S.C. § 1402(c)(2)).

is extended evenhandedly to citizens and non-citizens alike. See 42 U.S.C. § 411(c)(2) (A),(B), (D) and (E). One kind of discrimination that certainly should not withstand Equal Protection analysis is discrimination without any purpose whatsoever. That the discrimination fostered by 42 U.S.C. § 411(c)(2)(C) and 26 U.S.C. § 1402 (c)(2)(C) have no purpose is amply demonstrated by the circumstances and debate surrounding their enactment.

However, in spite of this clear evidence of Congressional intent and this Court's admonition that the judiciary should not "accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation," Weinberger v. Wisenfeld, 420 U.S. 636, 648 n.16, 43 L.Ed.2d 514, 525 n.16 (1975); accord, Califano v. Webster, 430 U.S. 313, 317, 51 L.Ed.2d 360, 364 (1977); Califano v. Goldfarb, 430 U.S. 199, 209, 51 L.Ed.2d 270, 278 n.8, 280-83 (1977); Mathews v. Lucas, 427 U.S. 495, 508 n.14, 49 L.Ed. 2d 651, 662 n.14, (1976), United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534-37, 37 L.Ed.2d 782, 788-89 (1973); the District Court sustained the exclusion of lawful permanent residents employed by foreign governments and their instrumentalities from the retirement and hospital insurance programs based upon a presumed congressional interest that might be rationally served by the discrimination.

This Court has made it clear that federal statutory provisions governing governmental benefits which make distinctions between citizens and non-citizens are constitutionally sound only if there is both a legitimate government interest furthered by the rule and a reasonable basis for concluding that the

classification rationally furthers that interest. Mathews v. Diaz, 426 U.S. 67, 81-84, 48 L.Ed.2d 478, 490-92 (1976). See also Vance v. Bradley, ___ U.S.___, 47 U.S.L.W. 4176, 4177 (February 20, 1979). The constitutionality of a statute thus depends not only upon the character of the discrimination but also upon its relation to legitimate legislative goals. Cf. Trimble v. Gordon, 430 U.S. 762, 769, 52 L.Ed.2d 31, 38 (1977). An analysis of the District Court's justification for the challenged classification, one that denies Social Security retirement and hospital insurance benefits to aliens lawfully admitted for permanent residence solely because they are employed by a foreign government or instrumentality, while granting such benefits to citizens similarly employed and all aliens in all other covered occupations within the United States, fails to reveal a legitimate governmental interest which is furthered in any manner, let alone in a rational fashion, by the challenged provisions. This sole interest cited by the court below, that Congress might have been concerned with preventing abuse of privileges and immunities granted pursuant to Section 247 of the Immigration and Nationality Act, 8 U.S.C. § 1257, is so conjectural as to render it irrational in light of the otherwise beneficient purposes of the Social Security Act.

Insofar as it is applicable to this case, Section 247(a) requires the Attorney General to adjust to that of nonimmigrant the status of aliens lawfully admitted for permanent residence in the United States who are employed by international organizations or foreign governments and their instrumentalities. See 8 U.S.C. § 1101(a)(15)(A), (E) and (G). Any such individual may maintain his or her status as a lawful permanent resident by waiving the rights, privileges, and immunities that accrue because

of one of the occupational statuses enumerated above. 8 U.S.C. § 1257(b)[12] Based upon the presumption that aliens covered by Section 247 "could retain their privileges for years and then change their status only at the last moment, in time to qualify for social security benefits," 453 F. Supp. at 638, the court below opined that Congress could reasonably have acted to prevent such abuse by refusing to extend Social Security Act coverage to lawful permanent residents employed by foreign governments and their instrumentalities.[13] That the purpose attributed to Congress by the District Court carries the "imagined purpose" analysis beyond the limits of tolerance is easily demonstrated. For one thing, adjustment of status to that of lawful permanent resident is not automatic, as the District Court so facilely presumed. Second, manipulation of the sort anticipated by the District Court would not result in any real benefit.

Once a non-immigrant has waived the rights, privileges and immunities that accrue by reason of his or her occupational status, adjustment to the status of lawful permanent resident is not easily accomplished. By executing a waiver the non-immigrant merely becomes eligible to apply for adjustment of status. An

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12. The most notable of these rights, privileges and immunities, and the one to which the District Court referred, is the exemption from Federal income taxation found in 26 U.S.C. § 893.

13. Appellant herein was a lawful permanent resident prior to the enactment of § 247 in 1952. She was prevented from signing a waiver of privileges and immunities by the United Nations, her employer at that time, and thus her status was adjusted to that of non-immigrant. When appellant left the employ of the United Nations she executed a § 247 waiver and applied for and was granted an adjustment of status to that of an alien lawfully admitted for permanent residence.

examination of Sections 245 and 249 of the Immigration and Nationality Act, 8 U.S.C. §§ 1255 & 1259, reveals the hazzards of this procedure. Under Section 245 the nonimmigrant must first show that an immigrant visa is immediately available. 8 C.F.R. § 245.1(g). Currently, no visas are available for any non-preference immigrants, nor are visas even available in many of the preference categories.[14] See "Immigrant Numbers for February, 1979", United States Department of State, Bureau of Consular Affairs January 18, 1979. (annexed hereto as Appendix I).

In some categories where visas are still theoretically available, the prospective immigrant must wait a substantial length of time merely to file an application for adjustment of status.[15]

In addition, all applicants in the third, sixth, and non-preference categories, see 8 U.S.C. § 1152(e)(3), (6) and (8), must obtain a labor certification from the United States Department of Labor. 8 U.S.C. § 1182(a)(14). The labor certification procedure alone is so treacherous that an expert in the field has described it as arbitrary, lacking in due process and "an administrative nightmare." Gordon, The Need to Modernize Our Immigration Laws, 13 San Diego L. Rev. 1, 12 (1975).

If the applicant has managed to clear these hurdles, he or she must still establish admissibility, that is, the applicant must show that he or she is not subject to any of the remaining thirty-one grounds for exclusion found in 8 U.S.C. 1182(a). This

14. 8 U.S.C. § 1152 outlines the order of preference in which applications for immigrant visas are granted, subject to the numerical limitation stated therein.

15. For example, a current visa applicant whose country of origin is India and who is a member of a profession, as defined by 8 U.S.C. § 1152(e)(3), currently must wait four years to apply.

strange conglomeration of exclusions bars from this country alien who (i) have suffered a single attack of insanity, 8 U.S.C. § 1182(a)(3); (ii) suffer from some other mental defect or are homosexual, 8 U.S.C. § 1182(a)(4); (iii) are afflicted with a dangerous contagious disease 8 U.S.C. § 1182(a)(6); (iv) suffer a physical disease, defect or disability that may affect their ability to earn a living, 8 U.S.C. § 1182(a)(7); (v) are likely to become public charges, 8 U.S.C. § 1182 (a)(15); or (vi) are anarchists, or are members of or are affiliated with a communist or totalitarian party or advocate communist or totalitarian doctrines, 8 U.S.C. § 1182(a)(28) and has been described as akin to "a magic mirror, reflecting the fears and concerns of past Congresses." Lennon v. Immigration and Naturalization Service, 527 F.2d 187, 189 (2d Cir. 1975). Any alien sacrificing his or her permanent resident status under Section 247 by refusing to execute a waiver would run the risk that any of the 1182(a) bars, a number of which are totally beyond the alien's control, would arise before he or she chose to execute a waiver and apply for adjustment of status.

Even after the alien has established that a visa is available and that he or she is not otherwise inadmissible under the provisions of § 1182(a) adjustment of status to that of permanent resident is not automatic. "Because this form of relief circumvents ordinary immigration procedures, it is estraordinary and will be granted only in meritorious cases, and the burden is on the immigrant to prove that his case is meritorious." Chen v. Foley, 385 F.2d 929, 934 (6th Cir. 1967). Cf. United States ex rel Hitopoulos v. Shaughnessy, 353 U.S. 72, 77, 1 L.Ed. 2d 652, 656 (1957). Accordingly, the Attorney General may and in fact does, refuse applications for adjustment

of status simply because no special equities are shown.[16]

Because aliens cannot slip in and out of permanent resident status with such ease that manipulation of the Social Security benefit program is a realistic possibility, such a speculative and attenuated rationale could not have been a concern of Congress in enacting the challenged amendments to the Act.[17]

Moreover, the suggestion that in failing to extend coverage to non-citizen employees of foreign governments and their instrumentalities Congress was concerned with manipulation of the Social Security system by individuals who would attempt to minimize their Federal tax liability and contributions to the Social Security trust fund while at the same time obtaining retirement insurance coverage rests upon the fallacious assumption that there is a benefit to be gained by such manipulation. This assumption is patently untrue.[18]

Social Security retirement insurance benefits are based upon the "average monthly wage" earned during the individual's "benefit computation years."[19] Although ignored by the District Court, the computations in the margin show that appellant, if she were entitled to Social Security coverage based upon her

16. Adjustment of status is also available to aliens who have been continuously residing in the United States since 1948 if the alien is a person of good moral character and is not ineligible for citizenship. Adjustment under this section is likewise subject to the Attorney General's discretion.

17. In fact, the Attorney General could deny an application for adjustment of status solely because the alien was attempting to abuse the Social Security system.

18. As a preliminary matter if should be noted that if all employees, both citizens and non-citizens, of foreign governments and their instrumentalities were covered by the retirement and hospital insurance programs, there would be no room for manipulation whatsoever. All such employees would simply be covered regardless of their status and could not avoid Social Security taxes by changing status.

19. Because an individual's contributions to the trust fund equal a percentage of his or her income (subject to the same maximum as the average monthly wage), benefits are also directly related to contributions made to the fund.

employment at the French Embassy, would be eligible for Social Security retirement insurance benefits of $138.90 per month.[20] Had her earnings record extended back to the 1950's (by an earlier § 1257 waiver) she could have become entitled to primary benefits

20. Under Section 202(a) of the Social Security Act, 42 U.S.C. § 402(a), a fully insured individual who has reached retirement age is entitled upon application to a monthly old-age insurance beenfit equal to his primary insurance amount." Section 215(a) of the Act, 42 U.S.C. § 415(a), sets out a table for determining the primary insurance amount. This amount is based on an individual's "average monthly wage" as defined in Section 215(b) of the Act, 42 U.S.C. § 415(b).

> (1) For the purposes of column III of the table appearing in subsection (a) of this section, an individual's "average monthly wage" shall be the quotient obtained by dividing --
>
> (A) the total of his wages paid in and self-employment income credited to his "benefit computation years" (determined under paragraph (2)), by
>
> (B) the number of months in such years.
>
> (2) (A) The number of an individual's "benefit computation years" shall be equal to the number of elapsed years (determined under paragraph (3) of this subsection) reduced by five; except that the number of an individual's benefit computation years shall in no case be less than two.
>
> (B) An individual's "benefit computation years" shall be those computation base years, equal in number to the number determined under subparagraph (A), for which the total of his wages and self-employment income is the largest.
>
> (C) For purposes of subparagraph (B), "computation base years" include only calendar years in the period after 1950 and prior to the earlier of the following years --
>
> (i) the year in which occurred (whether by reason if section 402(j)(1) of this title or otherwise) the first month for which the individual was entitled to old-age insurance benefits, or
>
> (ii) the year succeeding the year in which he died.
>
> * * * * * * * * * * * *
>
> Any calendar year all of which is included in a period of disability shall not be included as a computation base year.
>
> (3) For purposes of paragraph (2), the number of an individual's elapsed years is the number of calendar years after 1950 (or, if later, the year in which he attained age 21) and before the year in which he died, or if it occurred earlier but after 1960, the year in which he attained age 62.

(Footnote continued on next page)

of $259.00 per month. Thus, had appellant engaged in the clever manipulation suggested by the defendants she would have "succeeded" in reducing her retirement income (and, of course, the benefits paid out of the Social Security fund) by over $1,400 per year.[21] The incentives are clearly in favor of increasing the number of years during which covered income is earned, and not in limiting them to the minimum required for eligibility.

Nor, does addition to this equation of the exemption from Federal income taxation significantly affect this incentive. Appellant, for example, in 1970 paid $712 in Federal income tax on an adjusted gross income of $6,006.57[22] plus a Social Security self-employment tax of $331.20, a total tax liability

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(footnote continued)
Plaintiff herein reached age 62 during calendar year 1969. Thus plaintiffs' elapsed years equal 18, and her "benefit computation years" are the 13 years of greatest income between 1950 and the year in which she became entitled to old-age insurance benefits. These years and the income received during them are as follows:

1968	$ 4,510
1969	4,800
1970	4,800
1971	4,800
1972	460
8 other years	0
	$19,370

$$\text{Average monthly wage} = \frac{19,370}{12 \times 13} = \$124.16$$

This average monthly wage qualifies plaintiff for a "primary insurance amount" (according to the tables in effect in 1972) of $138.90. Had plaintiff earned $4,800 per year for 13 years or more between 1950 and retirement, and had these wages been subject to the social security self-employment tax, plaintiff's "average monthly wage" would have been $400 and her benefits ("primary insurance amount") upon retirement at age 65, $259.00 per month.

21. When dependent's benefits are considered, the disparity becomes even greater.

22. $4,800 of this were her wages from the French Embassy.

of $1,043.20. Thus the District Court's opinion rests on the assumption that Congress was concerned that lawful permanent residents in appellant's situation would, in order to avoid tax liabilities of approximately $1,000 per year, sacrifice future benefits of more than $1,400 per year as well as run the risk of never regaining lawful permanent resident status or of becoming disabled or otherwise unemployed prior to retirement.[23] This hypothesis is so conjectural that total exclusion from the Social Security retirement and hospital insurance programs of all aliens employed by foreign governments and their instrumentalities for this purpose would be utterly irrational. The numerous obstacles inherent in this scenario relegate the suggestion that Congress was concerned with widespread manipulation of the Social Security retirement system to a flight of fancy. It is much too slender a reed to sustain a classification in the face of an Equal Protection standard which requires more than such a "mere incantation of a proper" purpose. Trimble v. Gordon, 430 U.S. 762, 769, 52 L.Ed. 2d 31, 38 (1977). Classification must be tailored to fit to the interest sought to be promoted. Trimble v. Gordon, 430 U.S. 762, 770-72, 52 L.Ed. 2d 31, 39-40 (1977); Jiminez v. Weinberger, 417 U.S. 628, 633-35, 41 L.Ed.2d 363, 368-69 (1974). An analysis of the legislative

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23. It is equally unlikely that in enacting the challenged provision Congress could have been concerned with individuals whose incomes were high enough so that their exemption under 26 U.S.C. § 893 would realize greater savings than for appellant. Any individual with a high Federal income tax liability would be unwilling, at any time, to waive exemption therefrom solely for the purpose of becoming eligible, at some future date, for retirement and hospital insurance benefits. As late as 1972, when appellant retired, the maximum primary retirement benefit was less than $3,600 per year.

schemes of the Social Security and Immigration and Nationality Acts leads inexorably to the conclusion that prevention of abuse of the provisions of Section 247 of the Immigration and Nationality Act, 8 U.S.C. § 1257, could not have been the purpose of the challenged discrimination.

Another rationale propounded by the Government in support of the challenged legislative classification is the application of the principle that Congress can properly base the provision of rights and privileges to aliens in this country on their degree of affinity with the United States. In Mathews v. Diaz, 426 U.S. 67, 48 L.Ed. 2d 478 (1976) this Court considered a constitutional challenge to 42 U.S.C. § 1395o(2), a provision that extends eligibility for enrollment in the Medicare Part B program to resident citizens, age 65 or over, but denies eligibility to aliens admitted for permanent residence, age 65 or over, unless they have resided in the United States for at least five years. Defining the issue as "whether the statutory discrimination within the class of aliens - allowing benefits to some aliens but not to others - is permissible," 426 U.S. at 80, 48 L.Ed.2d at 490, the Court concluded that because extension of benefit to some aliens but not to others based upon their relative levels of affinity with the United States furthers legitimate governmental interests, it was "unquestionably reasonable" for Congress to condition an alien's eligibility for the Medicare Part B program on the character and duration of his or her residence. 426 U.S. at 82-83, 48 L.Ed.2d at 491-92. The instant case, however, differs fundamentally from Mathews v. Diaz. In analyzing the statutory scheme in Diaz, the affinity concept is readily apparent, inasmuch as the residency requirement for aliens admitted for permanent residence

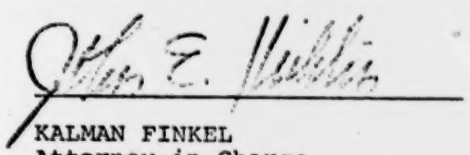
is applicable across the board under the Medicaid Part B Program. Further, the device of a durational residency requirement is a traditional method of selecting among residents where benefit programs and the like are concerned. The Social Security retirement and hospital insurance programs do not draw any other distinction based upon affinity with the United States. Eligibility for these programs is based solely upon the job performed and the length of service. All aliens, including legal permanent residents, visitors present in the United States legally but earning a living in violation of their immigration status and even aliens who are present in the United States illegally but who nevertheless obtain employment earn Social Security coverage and must pay the appropriate tax. See, e.g., Rev. Rul. 77-140, 1977 - 18 I.R.B., 1A Unempl. Ins. Rep. (CCH) ¶15,131. It cannot be said that Congress based Social Security retirement and hospital insurance benefits upon affinity to the United States when an alien who enters the United States surreptitiously and engages in what is for him illegal employment nonetheless immediately begins to accrue social security coverage, while plaintiff, an alien who entered the United States lawfully in 1944, was accorded the status of an alien lawfully admitted for permanent residence in 1967 and was thereafter employed by the Press and Information Division of the French Embassy, did not. The avowed purpose of the Act is to extend benefits to alien and citizen alike, and not to limit them based upon affinity with the United States.

CONCLUSION

Thus, the challenged legislative scheme, one that deprives lawful permanent residents employed within the United States by foreign governments and their instrumentalities of coverage under the Social Security retirement and hospital insurance programs while allowing citizens in the same employment and aliens in other employments to earn quarters of coverage under these programs, even if the alien is illegally in the United States and is illegally employed, is bereft of any legitimate governmental interest that is furthered in any rational manner by 42 U.S.C. § 411(c)(1)(C) or 26 U.S.C. § 1402(c)(2)(C). Accordingly, the questions presented by this appeal are substantial and merit plenary consideration of the Court. Probable jurisdiction should thus be noted and the case set for oral argument.

Dated: New York, New York
March 23, 1979

Respectfully submitted,



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